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In the

Supreme Court of the United States

October Term, 1957

No. [redacted] 84

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INCORPORATED, ET AL,

Petitioners

v.

COMMITTEE ON OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF OF THE COMMONWEALTH OF VIRGINIA, AMICUS CURIAE, IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

Page

THE INTEREST OF THE COMMONWEALTH OF VIRGINIA 1

THE ISSUES PRESENTED 2

STATEMENT 2

ARGUMENT 3

1. The "Controversy" Suggested by the Petitioners Has Now Become Moot 3
2. This Proceeding Involves No "Case" or "Controversy" 6
3. In No Instance Have the Petitioners Shown a Violation of Any Right They May Have Under the First Amendment 6

CONCLUSION: The petition for a writ of certiorari should be denied 8

APPENDIX:

Chapter 34 of Acts of General Assembly of Virginia, Extra Session of 1956 .....App. 1-2

TABLE OF CITATIONS

Cases

Alabama State Federation of Labor, et al v. McAdory, et al, 325 U. S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945) 7

Doremus v. Board of Education, 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952) 4

Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385 (1915) 7

McCabe v. Atchison, T. & S. F. R. Co., et al, 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169 (1914) 7

Page

Muskrat v. United States, 219 U. S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911) 6

Shaffer v. Howard, 249 U. S. 200, 39 S. Ct. 255, 63 L. Ed. 559 (1919) 5

United States of America v. Alaska Steamship Company, 253 U. S. 113, 40 S. Ct. 448, 64 L. Ed. 808 (1920) 4, 7

Statutes

Chapter 34 of Acts of General Assembly of Virginia, Extra Session of 1956 ..... 2, App. 1-2

Constitutional Provisions

First Amendment to the Constitution 7

Section 2 of Article III of the Constitution 6

In the

Supreme Court of the United States

October Term, 1957

No. 1049

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INCORPORATED, ET AL,

Petitioners

v.

COMMITTEE ON OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF OF THE COMMONWEALTH OF VIRGINIA, AMICUS CURIAE, IN OPPOSITION TO PETITION

THE INTEREST OF THE COMMONWEALTH OF VIRGINIA

This matter is one in which the petitioners seek to proceed against a Committee which no longer exists. Thus, there is no party respondent. However, the petitioners challenge the correctness of a decision of the Supreme Court of Appeals of Virginia, which decision the Commonwealth considers its duty to defend. Unless the Com-

monwealth, appearing as *amicus curiae*, asserts such defense, none can be asserted. Accordingly, the Commonwealth has a very real and substantial interest in this proceeding, and considers that its appearance as *amicus curiae* will be of material assistance to the Court.

THE ISSUES PRESENTED

1. The challenged subpoenas having become unenforceable because of the termination of the Committee for whose benefit they were issued, has the question of their validity become moot?
2. There being but one party to this proceeding, is there presented a "case" or "controversy" over which this Court has jurisdiction?
3. May this Court properly pass on a constitutional question based solely on hypothesis, and unsupported by facts of record?

STATEMENT

The Committee on Offenses Against the Administration of Justice, named by the petitioners as the respondent in this proceeding, was formed pursuant to Chapter 34 of the Acts of Assembly, enacted by the General Assembly of Virginia at its Extra Session of 1956. That Act is set out at pages 1 through 2 of the Appendix to this brief. Paragraph 2 of Section 3 of the Act provides: "This act shall be effective until the convening of the next regular session of the General Assembly." We believe this Court will take judicial notice that the "next regular session" convened on January 8, 1958. Accordingly, the named respondent became non-existent on that day. And there is no existing successor to that Committee.

Except for the failure to state, other than by inference, the facts recited in the preceding paragraph, the assertions made by the petitioners under the heading of "Statement of the Case" are substantially correct.

ARGUMENT

1.

The "Controversy" Suggested by the Petitioners Has Now Become Moot

The sole issue presented to the Supreme Court of Appeals of Virginia, and sought to be presented here, was whether the petitioners should obey subpoenas which were issued by the Hustings Court of the City of Richmond, and which directed the petitioners to disclose the names of their members to the "Committee on Offenses Against the Administration of Justice."

As we have stated, that Committee ceased to exist on the convening of the General Assembly of Virginia on January 8, 1958. By the death of the Committee, the questioned subpoenas became incapable of observance, and thus wholly without effect, because there was no "Committee" to whom the petitioners might give such information.

While it is true, as the petitioners recite, that the 1958 Session of the General Assembly made effective an act comparable to that under which the "Committee" was formed, yet that act has not resulted in the appointment of another committee. Should a new committee be appointed at some future time, it cannot now be known whether it will desire that the petitioners make known the names of their members. And even should another committee be so formed, and should it have such desire, it could in no way

seek the enforcement of the questioned subpoenas. Rather, it would find it necessary to commence anew a proceeding to obtain comparable subpoenas from some inferior court of the Commonwealth of Virginia.

It necessarily follows that the subpoenas challenged by this proceeding are wholly without effect and present no justiciable issue.

This principle was recently recognized in *Doremus* v. *Board of Education*, 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952), where this Court refused to consider the constitutionality of a state statute because the controversy had become moot. There, a New Jersey statute required the reading of Biblical verses at the opening of each public school day. A parent charged that the statute violated the First Amendment to the Constitution. In refusing to pass on the question, Mr. Justice Jackson speaking for the Court said, at pages 432-433 of 342 U. S.:

> "* * * However, it was agreed upon argument here that this child had graduated from the public schools before this appeal was taken to this Court. Obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest."

To like effect is *United States of America* v. *Alaska Steamship Company*, 253 U. S. 113, 116, 40 S. Ct. 448, 64 L. Ed. 808 (1920), where Mr. Justice Day stated:

> "* * *, this Court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or

counsel, whether in the case before the Court or in any other case, can enlarge the power, or affect the duty, of the Court in this regard.' " (Citing numerous cases)

Also, in *Shaffer* v. *Howard*, 249 U. S. 200, 201, 39 S. Ct. 255, 63 L. Ed. 559 (1919), a case quite similar to this, Mr. Chief Justice White said for the Court:

"Counsel for both parties having stated in answer to an inquiry on the subject submitted to them by the Court while the cause was pending after argument under submission that the term of office of the defendant officials had expired and their successors had qualified, and that there was no law of the state of Oklahoma authorizing a revival or continuance of the cause of action against such successors, it follows that the controversy has become merely moot, and that we have no authority to further consider or dispose of it. (Citing cases)

"True it is that counsel, in agreeing as to the statement above referred to, suggest that although the successors in office of the former defendants intend, in the discharge of their official duties, to enforce the tax complained of unless enjoined from doing so, nevertheless, in view of the importance to the people of the state that the subject-matter of the controversy be here determined, now request a decision of the pending cause irrespective of the disappearance of the parties defendant. But the absence of power which results from such disappearance cannot be supplied by the request referred to, since, after all, it amounts to but a suggestion that that be done which there is no authority to do; in other words, that the cause be decided in the absence of the parties whose presence is essential to its decision." (Citing cases)

The "controversy" suggested by the petitioners being now entirely moot, their petition should be denied.

2.

This Proceeding Involves No "Case" or "Controversy"

Section 2 of Article III of the Constitution invests this Court with jurisdiction over defined "cases" and "controversies." Most certainly, there can be no case or controversy unless a dispute of some character exists between two or more parties. Here there is but one party, the so-called "respondent" being non-existent.

As was aptly stated in *Muskrat* v. *United States*, 219 U. S. 346, 356, 31 S. Ct. 250, 55 L. Ed. 246 (1911):

> "'Judicial power * * * is the power of the Court to decide and pronounce a judgment and carry it into effect *between persons and parties* who bring a case before it for decision.'" (Italics ours)

This matter involving but one party, the Court is without jurisdiction to consider it, and for that reason also should deny the petition.

3.

In No Instance Have the Petitioners Shown a Violation of Any Right They May Have Under the First Amendment.

The petitioners, in asserting their right to free expression, state on pages 6 and 7 of their petition that their "views and aims are particularly unpopular and even dangerous in the South today, including Virginia" and that "revealing the names of petitioner-organizations' members would subject the members to reprisals, would seriously weaken the organizations and would threaten the continuance of petitioners' activities in Virginia to end racial discrimination."

However persuasive these conclusions may appear, they have no support whatever in the evidence of record. At no point did any witness so testify, nor any exhibit so recite. Thus, these conclusions are nothing more than mere conjecture and surmise.

It is well settled that this Court will not determine cases which, such as this, rest entirely upon hypothetical suggestion. In *Alabama State Federation of Labor, et al* v. *McAdory, et al*, 325 U. S. 450, 461, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945), Mr. Chief Justice Stone, speaking for this Court, said:

> "* * * This Court is without power to give advisory opinions. * * * [citing numerous authorities] * * *. *It has long been its considered practice not to decide abstract, hypothetical or contingent questions,* * * * [citing numerous authorities] * * *, or to decide any constitutional question in advance of the necessity for its decision, * * * [citing numerous authorities] * * *, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * [citing numerous authorities] * * *, or to decide any constitutional question except with reference to the particular facts to which it is to be applied, * * * [citing numerous authorities] * * *." (Italics ours)

See, to like effect, *McCabe* v. *Atchison, T. & S. F. R. Co., et al*, 235 U. S. 151, 164, 35 S. Ct. 69, 59 L. Ed. 169 (1914); *Hendrick* v. *Maryland*, 235 U. S. 610, 621, 35 S. Ct. 140, 59 L. Ed. 385 (1915); and *United States of America* v. *Alaska Steamship Company*, 253 U. S. 113, 116, 40 S. Ct. 448, 64 L. Ed. 808 (1920).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 3, 1958

CERTIFICATE OF SERVICE

I, William H. King, one of counsel for *Amicus Curiae* and a member of the Bar of the Supreme Court of the United States, do certify that I have served upon each of counsel of record for the petitioners copies of the foregoing brief by depositing such copies in the United States Mail on July 3, 1958, with first class postage prepaid, and addressed to each of such counsel of record at his post office address as it appears in the petition for a writ of certiorari.

(s) WILLIAM H. KING
one of Counsel for Amicus Curiae

Chapter 34 of Acts of Assembly, Extra Session of 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. There is hereby created a joint committee of the General Assembly to be known as the Committee on Offenses Against the Administration of Justice, hereinafter referred to as Joint Committee. Such Joint Committee shall investigate and determine the extent and manner in which the laws of the Commonwealth relating to the administration of justice are being administered and enforced and shall specifically direct its attention to the administration and enforcement of those laws relating to champerty, maintenance, barratry, running and capping and other offenses of any other nature relating to the promotion or support of litigation by persons who are not parties thereto. The Joint Committee shall be composed of five members to be selected as follows: Three of the members shall be appointed by the Speaker of the House of Delegates from the membership of the House Committee for Courts of Justice and two of the members shall be appointed by the President of the Senate from the membership of the Senate Committee for Courts of Justice. Members shall serve on the Joint Committee during the effective period of this act: the presiding officer of each house shall have the power to fill vacancies occurring on the Joint Committee. The Joint Committee shall meet at least once in each three month period and oftener on call of the chairman or a majority of the members. The members of the Joint Committee shall receive the same salary and expenses for each day spent in the performance of their duties as is allowed under §§ 14-29.1 and 14-5 of the Code of Virginia, respectively, to be paid from the contingent fund of the General Assembly

together with any other expenses incurred by the Joint Committee. The Joint Committee is hereby specifically vested with the powers and duties conferred upon committees of the General Assembly by § 30-10 of the Code of Virginia and any other provisions of law under which powers are conferred upon committees of the General Assembly. In addition to the foregoing powers, the Joint Committee shall be empowered to administer oaths and examine witnesses and may employ counsel to assist in its investigations. The Joint Committee may, in addition to the procedure provided in § 30-10 of the Code of Virginia, compel attendance of witnesses or production of documents by motion made before the circuit or corporation court having jurisdiction of the person or documents whose attendance or production is sought. The court, upon such motion, shall issue such subpoenas, writs, processes or orders as the court deems necessary.

§ 2. All officers and agencies of the State shall assist the Joint Committee in the discharge of its duties.

§ 3. The Joint Committee shall have plenary power to oversee the administration and manner of enforcement of the several statutes set forth in § 1 hereof, and, not later than sixty days preceding the next regular session of the General Assembly, it shall make a written report to the General Assembly upon the administration and method of enforcement of said statutes and shall set forth in its report its findings and recommendations and drafts of any amendatory legislation the Joint Committee deems desirable.

2. This act shall be effective until the convening of the next regular session of the General Assembly.

3. An emergency exists and this act is in force from its passage.